IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 13TH JUNE 2007 / 23RD JYAISHTA 1929

WP(C).No. 3554 of 2007(W)

AGAINST THE ORDER IN EP.37/2004 IN
OS.351/2001 of MUN-MAGI COURT, SASTHAMCOTTA

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PETITIONER:

MOHAMMED KUNJU, S/O.KADARKUNJU,
AGED 54 YEARS, KALATHUVILAYIL, PUTHEN PURAYIL,
PALLISSERICAL, SASTHAMCOTTA, KOLLAM.

BY ADV. SRI.R.SATISH KUMAR

RESPONDENTS:

C.RADHAKRISHNA PILLAI,
KOCHUMADATIL VEEDU, NADUVILAKKARA MURI,
THEVALAKKARA VILLAGE.

BY ADV. SRI.BRIJESH MOHAN
SMT.RESMI G. NAIR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS EXTS:

EXT.P1: TRUE COPY OF THE ORDER DT.26.7.2006 IN E.P.NO: 37/2004 IN O.S.NO:351/2001 OF THE MUNSIFF MAGISTRATE, SASTHAMCOTTA

EXT.P2: -DO- OF C.R.P. NO: 790/2006 FILED BY THE PETITIONER BEFORE THIS HONOURABLE COURT

EXT.P3: -DO- OF THE JUDGMENT DT.6.10.2006 IN C.R.P.NO: 790/2006 OF THIS HONOURABLE COURT

EXT.P4: -DO- OF THE INSOLVENCY PETITION NO:20/2006 FILED BY THE PETITIONER BEFORE THE SUB COURT, KOLLAM

EXT.P5: -DO- OF THE E.A.NO: 110/2006 IN E.P.NO: 37/2004 IN O.S.NO: 351/2001 FILED BY THE PETITIONER BEFORE THE EXECUTION COURT

EXT.P6: -DO- OF THE ORDER DT.28.11.2006 IN E.A.NO: 110/2006 IN E.P.NO: 37/2004 IN O.S.NO:351/2001 OF THE MUNSIFF MAGISTRATE, SASTHAMCOTTA

jj /TRUE COPY/

P.A.TO JUDGE

M.N.KRISHNAN, J.

WP(C)No. 3554 OF 2007 W

Dated this the 13th June, 2007.

JUDGMENT

This writ petition is filed seeking to quash the order passed in E.P.37/04 in O.S.351/01 on 26.7.06. By rejecting the application the court had ordered to issue warrant of arrest against the judgment debtor. The said execution petition is filed to execute the decree passed against the writ petitioner. The writ petitioner has submitted that he has filed an insolvency petition before the Subordinate Judge's Court, Kollam to adjudicate him as insolvent and therefore the order of arrest may be recalled. The executing court disposed of the application holding that he had made a payment of Rs.25,000/- and thereafter he was released on a kychit, brought, re-arrested and, therefore, could not take the plea of this nature. Section 55(4) of CPC reads as follows:-

> "Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court may release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realised or commit him to the civil prison in execution of the decree."

So, a reading of the above provision will give an indication that when a person intends to apply for declining him as insolvent he need not be sent to prison direct. In this case it is submitted that he had already applied for getting himself adjudicated as an insolvent under the provisions of the Insolvency Act. A person is adjudicated as insolvent primarily when it is found that his liabilities far exceed the assets. So, it will have a direct bearing on the capacity to wipe off the liability. Therefore, I feel the court below was not correct in ordering arrest warrant against him. Therefore, I direct the writ petitioner to appear before the court below and execute an undertaking that he will be present as and when required by the court and thereafter a further direction is also given to the Subordinate Judge, Kollam to dispose of I.P.20/06 which is pending before that court within a period of three months from the date of receipt of a copy of this judgment. The parties are directed to take copies and submit it before the above courts for further action and compliance. Till that time the judgment debtor need not be arrested and send to prison.

M.N.KRISHNAN
Judge

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